

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint)	SUMMARY OF FACTS
Against People for Responsible)	AND
Government and Sunny McGee)	STATEMENT OF FINDINGS

Brian Close filed a complaint alleging that People for Responsible Government, a political committee, and Sunny McGee, a candidate, violated certain Montana campaign finance and practices laws. The complaint describes a number of claims, which have been restated as follows:

Claim 1

The complaint alleges that People for Responsible Government violated Administrative Rules of Montana (ARM) 44.10.405 when it failed to disclose its opposition to certain candidates and its support of candidate Sunny McGee.

Claim 2

The complaint alleges that People for Responsible Government and Sunny McGee violated Montana Code Annotated § 13-37-216 as a result of the “coordination” of their respective campaigns.

Claim 3

The complaint alleges that People for Responsible Government conducted an independent campaign in support of Sunny McGee, and failed to disclose its support of the candidate.

Claim 4

The complaint alleges that People for Responsible Government violated Montana Code Annotated §13-35-227, which prohibits corporations from making direct contributions and expenditures in connection with a candidate.

Claim 5

The complaint alleges that People for Responsible Government and its treasurers, Catherine Simonson and Kurt Shull, and Sunny McGee and her campaign treasurer, Jennifer Raybeck, violated the “oath or affirmation” requirement of Montana Code Annotated §13-37-231.

Claim 6

The complaint alleges that People for Responsible Government failed to list all of its officers, in violation of Montana Code Annotated §13-37-201 and ARM 44.10.405.

Claim 7

The complaint alleges that People for Responsible Government failed to file its campaign finance reports with the county election administrator, as required by Montana Code Annotated §13-37-225.

SUMMARY OF FACTS

1. People for Responsible Government, Inc. (PRG), was formed as a general business, for-profit Montana corporation on September 10, 2001. PRG filed a C-2 Statement of Organization as a political committee with the office of the Commissioner of Political Practices (Commissioner) on September 17, 2001. The C-2 listed the following officers of the political committee: Cathi Simonson, Treasurer; Scott LeProwse, President; Mike Hope, Vice President; and Kurtis M. Shull, Secretary. On the C-2, PRG’s purpose was stated as follows: “To support or oppose candidates for elective office, ballot issues and political action as determined appropriate by the Directors of the Corporation.”

2. On September 10, 2001, PRG filed Articles of Incorporation with the Office of the Montana Secretary of State. According to Article Two, the period of duration of PRG was stated to be “perpetual.” Article Three listed the purposes of the corporation, including:

To support or oppose candidates for elective office, ballot issues and political issues as determined appropriate by the Directors of the Corporation.

To engage in the ownership, leasing and renting of real and personal property for commercial purposes, . . .

To own, receive, purchase, invest in, mortgage, pledge, transfer, and in any way and all other ways, own and dispose of properties of any kind or nature, whether real or personal.

To carry on any business whatsoever that this corporation may deem proper or convenient in connection with any of the foregoing purposes or otherwise, or that it may deem calculated, directly, or indirectly, to improve the interest of this corporation, . . .

Article Four authorized the corporation to issue 50,000 shares of capital stock, with no par value.

3. PRG became involved in the Bozeman city elections in 2001.

4. In October 2002, following an investigation of a campaign finance and practices complaint filed against PRG and the Gallatin Valley Licensed Beverage Association, the Commissioner found sufficient evidence to conclude that PRG, as a for-profit corporation, violated Montana Code Annotated § 13-35-227 by making illegal corporate expenditures in connection with a candidate or a political committee that supports or opposes a candidate. PRG had made a series of independent expenditures for newspaper advertisements, radio advertisements, and yard signs containing express advocacy opposing certain candidates for the Bozeman City Commission. The Commissioner also concluded that PRG violated several other statutes and one administrative rule. The matter was ultimately resolved pursuant to a settlement agreement executed in June 2003, with PRG and the Gallatin Valley Licensed Beverage Association making a monetary payment to the Commissioner's office.

5. According to information maintained by the office of the Montana Secretary of State, the corporation known as PRG was involuntarily dissolved as of December 2, 2002, because it failed to file its annual report within 90 days of September 1, 2002.

6. On August 1, 2003, People for Responsible Government, Inc. was formed as a public benefit corporation without members, according to information maintained by the office of the Montana Secretary of State.

7. On August 15, 2003, Chris Gallus, attorney for PRG, wrote a letter to the Commissioner's office requesting that the political committee known as PRG be "closed," and that "all rights and obligations therefrom" be transferred to a "new non-profit political committee of the same name." Gallus's letter noted that the corporation known as People for Responsible Government, Inc. had been involuntarily dissolved by the office of the Montana Secretary of State. Enclosed with the letter was a new C-2 (Statement of Organization) identifying a new political committee known as "People for Responsible Government" and listing the following officers: Kurtis Shull, Treasurer; and Cathi Simonson, Deputy Treasurer. No other officers were listed. The C-2 listed PRG2's¹ purpose as follows: "Support or oppose local or state candidates for political office and ballot issues, provide voter information, and conduct political activity as determined by directors." Under the portion of the C-2 permitting a listing of the names of candidates or ballot issues to be supported or opposed, PRG2 wrote the following: "No candidates or issues have been selected for support or opposition as of the filing of this C-2."

8. On September 5, 2003, Gallus sent a letter to the Commissioner's office requesting that the office make a finding regarding PRG2's ability to make independent expenditures in candidate elections, and asking whether PRG2 could make direct contributions to candidates. Gallus provided a copy of PRG2's Articles of Incorporation. In subsequent correspondence Mr. Gallus also provided a copy of PRG2's Bylaws.

9. On September 25, 2003, the Commissioner's office issued an advisory opinion responding to PRG2's questions. The advisory opinion found that, based on the information provided by Gallus, PRG2's features appeared to be consistent with two of the essential criteria established by the United States Supreme Court in Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (MCFL). The advisory opinion noted, however, that insufficient information was provided to enable the Commissioner to

¹ To avoid confusion, the political committee formed pursuant to the August 15, 2003 C-2, as well as the nonprofit corporation of the same name formed on August 1, 2003, will be referred to herein as "PRG2," even though the new committee and new corporation retained the same name as their predecessor – People for Responsible Government.

conclude that PRG2 appeared to meet the third feature found essential in MCFL – that the corporation was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. Based on this deficiency, the Commissioner’s advisory opinion stated that the Commissioner could not conclude that PRG2 is a qualified non-profit corporation that meets all the essential criteria established by the United States Supreme Court in MCFL. See discussion in Statement of Findings. The advisory opinion also concluded that, based on the United States Supreme Court’s opinion in Federal Election Comm’n v. Beaumont, 539 U.S. 146 (2003), PRG2 may not make direct corporate contributions to candidates, political committees that support or oppose candidates, or political parties (as opposed to independent expenditures).

10. On October 17, 2003, Gallus provided additional information to the Commissioner’s office, to address the issues raised in the Commissioner’s advisory opinion. Included with the information provided by Gallus was a copy of minutes of a special meeting held by PRG2 on October 17, 2003. The meeting minutes reflect that PRG2 resolved to amend its Articles of Incorporation and its Bylaws to delete language relating to the ability of PRG2 to accept corporate revenue in any amount whatsoever, including references to amounts that, in the aggregate, constitute more than 5% annually of PRG2’s total revenue. The minutes also reflect that PRG2 resolved that it is its policy that it will not accept corporate members; that it is PRG2’s policy that it will not accept any revenue from for-profit corporations, labor unions, or any other impermissible revenue source; and that PRG2 will not use treasury funds to make direct or in-kind contributions to candidates or to a candidate’s political committee. Finally, the minutes reflect that PRG2 resolved and made a finding that it was not established by a business corporation or labor union. According to the special meeting minutes, Gallus was instructed to “make the corrections to each document herein referenced, present these minutes and resolutions to any appropriate parties, pay any associated fees, and conduct any activity that in his legal opinion will most expeditiously resolve the matters herein contained.”

11. With his October 17, 2003 letter to the Commissioner, Gallus also provided a copy of a document that was filed with the Office of the Secretary of State, entitled “Articles of Amendment for Nonprofit Corporation.” The document stated that PRG2’s Articles of Incorporation were amended as follows: “Delete language in purpose statement as follows: In 1 d. following “accept” strike: “in the aggregate more than 5% annually of its total.” The net effect of this change is that the relevant language in subsection 1 d. of Article IV, the “Purpose” section of the Articles of Incorporation, now reads:

The corporation is formed to receive and administer funds exclusively for community action and political purposes without pecuniary gain or profit, according to the purposes for which the corporation is organized, which are as follows:

1. To support or oppose candidates for elective office, ballot issues and political issues in a manner permissible as per federal law and the laws of the State of Montana governing political activity by non-profit corporations; to wit, the corporations will not:

...

d. accept revenue from foreign or domestic for-profit corporations.

12. PRG2’s Bylaws were also amended to reflect the changes approved in the special meeting held by PRG2 on October 17, 2003. In addition, during the October 17, 2003 meeting PRG2 adopted corporate resolutions stating the following:

[I]t is the policy of [PRG2] that [PRG2] will not accept corporate members;

[I]t is the policy of [PRG2] that [PRG2] will not accept any revenue from for-profit corporations, labor unions or any other impermissible revenue source in conducting activity relating to [PRG2’s] operations;

[PRG2] will not use treasury funds to make direct or in-kind contributions to candidates or a candidate’s political committee, [PRG2] is established in order to make independent expenditures and will therefore follow rules relating to such expenditures; and

[T]he Board of Directors of [PRG2] finds and hereby asserts that [PRG2] was not established by a business corporation or labor union for purposes of conducting its activity or otherwise.

13. On October 17, 2003 PRG2 filed an amended C-2 with the Commissioner. The C-2 listed the same officers as the C-2 filed on August 15, 2003 (see Fact 7). The C-2 stated PRG2's purpose as follows: "To support or oppose candidates for elective office via independent expenditures and to support or oppose ballot issues through contributions or expenditures." Under the portion of the C-2 permitting a listing of the names of candidates or ballot issues to be supported or opposed, PRG2 left the space blank.

14. In response to the complaint, counsel for PRG2 contends that the intent of the political committee was to remain active year after year, and that therefore it did not list specific individual candidates whom it supported or opposed. PRG2 believed that if it listed specific candidates it could possibly be considered a particular candidate committee rather than a political action committee (PAC).

15. The Commissioner's office typically does not require "on-going" or year-to-year political committees such as PRG2 to amend their C-2's each year by specifying which candidates or issues the committee is supporting or opposing. However, if a committee undergoes other changes, such as a change of treasurers, change of address, or change of bank depository, an amended C-2 must be filed within five days.

16. PRG2 paid for a number of newspaper and radio ads prior to the November 4, 2003 election. The content of each of the various ads has been carefully reviewed and analyzed.

17. On October 1, 3, and 29, 2003, PRG2 ran a newspaper ad that recited PRG2's "mission statement:"

As concerned citizens of Bozeman, it is our mission to urge Bozeman voters to learn about the candidates who are running for election on November 4th and the issues that are facing our city. Furthermore, our mission is to encourage all voters to visit the polls and make an informed decision.

VOTE TUESDAY, NOVEMBER 4TH

18. On October 5, 8, 10, 12, 14, 15, 17, and 18, PRG2 ran various newspaper ads that discussed a number of issues facing voters in the upcoming election. Only one of those ads

named a specific candidate (see Fact 19). A close examination of each of the ads leads to the conclusion that none of them can reasonably be construed as containing express advocacy either in support of or in opposition to any specific candidates for the Bozeman City Commission. See discussion in Statement of Findings.

19. Of the ads referenced in Fact 18, above, the only one that named a specific candidate ran on October 5 and 8, 2003. The text of the ad stated:

“We need less tyranny than we are getting right now in our country, and I think we have to be prepared to fight that tyranny, which unfortunately is our government.”

-- Joe Frost, Candidate for Bozeman City Commission on the Patriot Act

Voting – The original Patriot Act

Voice your opinion

VOTE TUESDAY, NOVEMBER 4th

For the reasons discussed in the Statement of Findings, the ad can not reasonably be construed as containing express advocacy either in support of or in opposition to candidate Joe Frost.

20. On October 19, 22, 23, 24, and 29, PRG2 ran various newspaper ads that can reasonably be construed as containing express advocacy in opposition to two specific candidates for the Bozeman City Commission. The ads were critical of and clearly opposed to Bozeman City Commission candidates Steve Kirchhoff and Joe Frost.

21. PRG2 also paid for several radio ads that discussed some of the issues facing voters in the upcoming city election. None of the ads mentioned the name of any specific candidate, and the ads urged voters to “make an informed decision,” “make sure your vote reflects the important issues facing our community,” and “make your own choices based on your own information.” None of the radio ads can reasonably be construed as containing express advocacy either in support of or in opposition to any specific candidates for the Bozeman City Commission.

22. None of the ads purchased by PRG2 mentioned candidate Sunny McGee by name, and none of them can reasonably be construed as supportive of McGee's candidacy for the Bozeman City Commission.

23. Sunny McGee was a candidate for the Bozeman City Commission in the November, 2003 election. She did not win the election. At the time McGee was a part-time employee of the Rocking R Bar in Bozeman. Mike Hope was McGee's boss at the Rocking R.

24. Mike Hope did not "recruit" or urge McGee to run for the City Commission. McGee was first approached about being a candidate by Mike Harris in early 2003. Harris was McGee's friend and a customer of the Rocking R. According to McGee, she spent weeks discussing her potential candidacy with family members, friends, business owners, and citizens of the community, including Hope.

25. Hope states he was surprised when McGee advised him that she was considering becoming a candidate for the City Commission. Hope contends he was no longer affiliated with PRG at the time of McGee's campaign activities. Hope said he encouraged McGee to continue campaigning "when she would get down," and as a member of the Bozeman Chamber of Commerce he introduced McGee to other members of the Chamber. Chris Gallus, counsel for PRG2, clarified that Mike Hope did not resign from the involuntarily dissolved PRG, but Hope did not "sign on" when PRG2 was created in August, 2003.

26. Cathi Simonson, PRG2's Deputy Treasurer, states she has never met Sunny McGee, and she only knew about her based on what she read in the newspaper. She had no involvement in McGee's campaign.

27. Kurt Shull, PRG2's Treasurer, states that PRG2 did not discuss the McGee campaign, and Shull did not discuss the campaign with Mike Hope.

28. Simonson and Shull state that neither of them were approached by any representatives of the McGee campaign at any time during McGee's candidacy. Simonson and Shull also contend that PRG2 was never asked to assist with or support the McGee campaign.

29. Mike Hope contributed to the campaigns of both Sunny McGee and Jeff Krauss, another candidate for the Bozeman City Commission.

30. McGee states that those who contributed to her campaign were primarily friends and acquaintances of hers. Mike Harris helped her to get some contributions from Republican groups. At the time of her candidacy McGee had lived in Bozeman her entire life, and she was well known in the Bozeman business community as a result of working at her parents' local flower shop. McGee believes that a relatively small percentage of people who contributed to PRG2 also contributed to her campaign.

31. A review of campaign finance reports on file in the Commissioner's office shows that there were 45 contributors to PRG2 and 153 contributors to the McGee campaign. 23 of those who contributed to the McGee campaign also contributed to PRG2. Thus, approximately 15% of the contributors to the McGee campaign also contributed to PRG2.

32. McGee, Mike Harris, and Jennifer Raybuck were the three primary members of the McGee campaign. Jennifer Raybuck was the Deputy Treasurer and usually signed the campaign finance reports that McGee filed.

33. McGee, Raybuck and Harris came up with most of the ideas for McGee's campaign ads. All three of them deny that they were ever approached by representatives or members of PRG2 regarding McGee's campaign, and all three deny that they were ever approached by, or influenced on the campaign by PRG2 during McGee's campaign.

34. No evidence, documentary or otherwise, was disclosed during this investigation that would support a conclusion that PRG2 coordinated its activities with any candidate, including McGee.

35. According to their campaign finance reports filed with the Commissioner's office, PRG2 did not make any direct or in-kind contributions to any candidates, including McGee.

36. The complaint alleges that McGee utilized several specific campaign "themes" that were quite similar to themes discussed in campaign ads placed by PRG2. A review of the various campaign ads placed by McGee and PRG2 does not disclose any discernable pattern or

striking similarity. Candidates McGee, Steve Kirchhoff, Joe Frost, and Jeff Krauss, in both campaign ads and campaign statements, discussed a number of issues facing Bozeman, including growth, budget issues, transportation, and urban sprawl. PRG2 also weighed in on many of the same issues through the ads that it financed prior to the election. Although McGee and PRG2 may have taken similar stances on several issues, there is no indication or evidence that there was collaboration between the two campaigns regarding campaign themes or campaign ads.

37. The 2004 Montana Corporation Annual Report filed by PRG2 with the office of the Montana Secretary of State lists Scott LeProwse as President of PRG2; Tyler Merica as Vice President; Kurt Shull as Secretary; and Kurt Shull as Treasurer. Counsel for PRG2 believes that the President and Vice President of PRG2 were elected at the same time as Kurt Shull was elected Secretary of PRG2. Shull was signing documents as Secretary on October 17, 2003. There are no documents in the files in the Commissioner's office listing LeProwse as President or Merica as Vice President of PRG2.

38. Political committee campaign finance reports (C-6) are required to be filed 12 days prior to an election and 20 days after an election. Because the election was held on November 4, 2003, PRG2's pre-election C-6 report was required to be filed by October 23, 2003. PRG2 timely filed its pre-election report with the office of the Commissioner on October 23, 2003. PRG2 filed a copy of the pre-election C-6 with the Gallatin County Elections Department on October 24, 2003.

STATEMENT OF FINDINGS

Claim 1

The complaint alleges that PRG2 violated ARM 44.10.405 by failing to disclose its opposition to certain candidates and its support of candidate Sunny McGee. As noted in Facts 22, 26, 27, 28, 33, and 34, there is no evidence that PRG2 supported the candidacy of McGee. PRG2 did, however, oppose candidates Steve Kirchhoff and Joe Frost. See Fact 20. As set forth in Facts 7 and 13, PRG2's C-2's did not identify by name any specific candidates that PRG2 intended to support or oppose.

ARM 44.10.405 provides:

**STATEMENT OF ORGANIZATION - POLITICAL COMMITTEE,
INFORMATION REQUIRED**

(1) A statement of organization required to be filed pursuant to 13-37-20113-37-201 and 13-37-20513-37-205, MCA, shall include, but not be limited to:

- (a) The complete name and address of a political committee.
- (b) The complete names and address of all related or affiliated political committees, and the nature of the relationship or affiliation.
- (c) The complete name and address of its campaign treasurer and campaign depository, and the complete name and address of its deputy campaign treasurer and secondary campaign depository, if any.
- (d) The complete names, addresses, and titles of its officers, if any.
- (e) A statement of whether a committee is incorporated.
- (f) The name, office sought, and party affiliation (if any) of each candidate whom a committee is supporting or opposing; if a committee is supporting the entire ticket of any party, the name of the party.
- (g) Ballot issue or issues concerned, if any, and whether a committee is in favor of or opposition to such issue or issues. (Emphasis added).

Subsection (f) of the rule would appear to require a C-2 to identify and include pertinent information regarding each candidate a political committee is opposing. However, as noted in Fact 15, the Commissioner's office typically does not require "on-going" political committees such as PRG2 to periodically amend their C-2's by specifying which candidates or issues the committee is currently supporting or opposing. PRG2's initial C-2, filed in August, 2003, stated that at that time PRG2 had not decided which candidates to support or oppose. When PRG2 filed an amended C-2 on October 17th, the C-2 did not list any candidates the committee intended to support or oppose. See Facts 7 and 13. As of October 17, 2003, PRG2 had not placed any ads in support of or in opposition to any specific candidates. See Facts 16-20. PRG2's first ad containing express advocacy in opposition to a specific candidate ran on October 19, 2003. See Fact 20. Because on-going political committees are not required to amend their C-2's when they decide to support or oppose a specific candidate, PRG2 did not violate ARM 44.10.405.

Claim 2

The complaint alleges that PRG2 and Sunny McGee engaged in coordinated or “parallel” campaigns and thereby violated Montana Code Annotated § 13-37-216. The statute establishes limitations on contributions to candidates. The law provides, in relevant part, as follows:

(1) (b) A contribution to a candidate includes contributions made to the candidate’s committee and to any political committee organized on the candidate’s behalf.

(2) (a) A political committee that is not independent of the candidate is considered to be organized on the candidate's behalf. For the purposes of this section, an independent committee means a committee that is not specifically organized on behalf of a particular candidate or that is not controlled either directly or indirectly by a candidate or candidate's committee and that does not act jointly with a candidate or candidate's committee in conjunction with the making of expenditures or accepting contributions.

The evidence described in Facts 22, 25-31, and 33-36 does not support a conclusion that PRG2 was organized on Sunny McGee’s behalf, was “controlled either directly or indirectly” by Sunny McGee or Sunny McGee’s campaign, or acted jointly with Sunny McGee or Sunny McGee’s campaign in making expenditures or accepting contributions. Therefore, there is no evidence that PRG2 or Sunny McGee violated Montana Code Annotated § 13-37-216.

Claim 3

The complaint alleges that PRG2 conducted an independent campaign in support of Sunny McGee, and failed to disclose its support of the candidate. As discussed above in relation to Claim 1, there is no evidence that PRG2 supported the candidacy of McGee. Moreover, as discussed above in relation to Claim 2, there is no evidence that either PRG2 or McGee violated Montana Code Annotated § 13-37-216. Therefore, PRG2 did not conduct an independent campaign in support of McGee and fail to disclose its support.

Claim 4

The complaint alleges that PRG2 violated a Montana law that prohibits corporations from making direct contributions or expenditures in connection with a candidate. Montana Code Annotated § 13-35-227 provides as follows:

Prohibited contributions from corporations. (1) A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee which supports or opposes a candidate or a political party.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

The statute appears on its face to prohibit all corporations, including nonprofit corporations, from making contributions or expenditures in connection with candidates, other than through separate, segregated funds. Statutes are presumed to be constitutional, but they must be construed narrowly to avoid an unconstitutional interpretation if possible. State v. Nye, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997).

Where corporate expenditures are prohibited by law, courts have held in general that corporate expenditures not coordinated with a candidate are prohibited if the political message expressly advocates the election or defeat of a clearly identified candidate. Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986) (MCFL); Faucher v. Federal Election Comm'n, 928 F.2d 468, 470 (1st Cir.), *cert. denied*, 112 S. Ct. 79 (1991). The “express advocacy” standard was discussed in some detail in the decision issued by this office in Matter of the Complaint Against People for Responsible Government and the Gallatin Valley Licensed Beverage Association (October 7, 2002). In MCFL The United States Supreme Court

also ruled that, for purposes of regulation of certain corporate political activity, a state must consider the particular attributes of the corporation. Specifically, the Court ruled that a federal statutory restriction that requires corporations to make independent political expenditures through separate, segregated funds is unconstitutional as applied to a corporation that possesses the following features:

1. It was formed for the express purpose of promoting political ideas, and cannot engage in business activities.
2. It has no shareholders or other persons affiliated so as to have a claim on its assets or earnings.
3. It was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

MCFL, 479 U.S. at 263-64. The Court later reaffirmed these principles in Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), again in the context of independent political expenditures by corporations.

On the other hand, the Court has found a “fundamental constitutional difference between money spent to advertise one’s views independently of the candidate’s campaign and money contributed to the candidate to be spent on his campaign.” Federal Election Comm’n v. National Conservative Political Action Committee, 470 U.S. 480, 497 (1985). The Court has noted that “restrictions on contributions require less compelling justification than restrictions on independent spending.” MCFL, 479 U.S. at 259-60.

In light of the above holdings of the United States Supreme Court, it is likely a court would determine that the State of Montana may not enforce the provisions of Montana Code Annotated § 13-35-227 against corporations that meet the criteria that the Supreme Court

established in MCFL, to regulate independent corporate expenditures. An independent expenditure is defined in MAR 44.10.323(3) as:

[A]n expenditure for communications advocating the success or defeat of a candidate which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or an agent of a candidate or committee.

Thus, it is likely that Montana cannot require independent expenditures by corporations that meet the criteria in MCFL to be made through separate, segregated funds.

Facts 5-12 describe the actions taken by PRG2 to transform itself from a for-profit corporation to a non-profit public benefit corporation. Based on the facts disclosed during the investigation, it appears that as of October 17, 2003, PRG2 was a non-profit corporation that met all the criteria established by the United States Supreme Court in the MCFL case. Thus it was not required to form a separate, segregated fund to make independent expenditures in support of or in opposition to a candidate. As described in Facts 17-21, PRG2 first ran ads containing express advocacy in opposition to specific candidates on October 19, 2003, two days after it had taken all necessary steps to qualify as an MCFL – type non-profit corporation. Therefore, there is no evidence that supports a conclusion that PRG2 made illegal corporate expenditures in connection with a candidate.

As discussed in Fact 19, PRG2 ran an ad on October 5 and 8, 2003 that quoted a statement attributed to candidate Joe Frost regarding the federal Patriot Act. The ad did not contain any language that could be construed as urging voters to either support or oppose Frost in the election; it simply set forth the quote attributed to him and urged the reader to voice their opinion and vote on November 4th. Given the intense national debate regarding certain provisions of the Patriot Act, as well as on-going court challenges to portions of the Act, the quoted statement attributed to Frost could conceivably either help or hinder his campaign,

depending on the particular viewpoint of the reader of the ad. For this reason it is not possible to conclude that the ad contains express advocacy either in support of or in opposition to a candidate. Therefore the ad that ran on October 5 and 8, 2003 was not the result of a prohibited corporate expenditure, even though the expenditure was made prior to the time that PRG2 had successfully transformed itself into a qualified MCFL-type non-profit corporation.

Claim 5

The complaint alleges that PRG2 and the Sunny McGee campaign, as well as the respective treasurers of each, violated the “oath or affirmation” requirement of Montana Code Annotated § 13-37-231. The pertinent language in that statute provides:

Reports to be certified as true and correct. (1) A report required by this chapter to be filed by a candidate or political committee shall be verified as true and correct by the oath or affirmation of the individual filing the report. The individual filing the report shall be the candidate or an officer of a political committee who is on file as an officer of the committee with the commissioner.

Each campaign finance report filed with the Commissioner’s office contains a “Certification” to be signed by an officer of a political committee (on a C-6) or a candidate or candidate’s treasurer (on a C-5). By signing the Certification the signer certifies that the report “is complete and correct” to the best of the signer’s knowledge.

This charge against PRG2 and the McGee campaign seems to be based on the theory that there was coordination between PRG2 and the McGee campaign, and that consequently there were unreported contributions from PRG2 to the McGee campaign. Since no evidence was disclosed tending to show coordination between PRG2 and the McGee campaign, there is no basis to conclude that the respective treasurers of PRG 2 and the McGee campaign violated the provisions of Montana Code Annotated § 13-37-231 when they signed the Certification portion of the campaign finance reports that were filed.

Claim 6

The complaint alleges that PRG2 failed to list all of its officers on the C-2 it filed with the Commissioner's office. Montana Code Annotated § 13-37-201 requires a political committee to file a Statement of Organization (form C-2) within five days after making an expenditure. The C-2 is required to list the committee treasurer as well as "all other officers, if any." The same requirement is stated in ARM 44.10.405(1)(d). The initial and amended C-2 filed by PRG2 listed Kurt Shull as the Treasurer and Cathi Simonson as the Deputy Treasurer. No other officers of PRG2 were listed.

According to the complaint, the corporation known as PRG, Inc. referred to additional officers and directors in its Articles of Incorporation and its minutes. The complaint alleges that since only Shull and Simonson were listed as officers of PRG2 on the C-2, the political committee violated Montana Code Annotated § 13-37-201 and ARM 44.10.405. As noted in Fact 36, Scott LeProwse was the President and Tyler Merica was the Vice President of PRG2. Their names should have been listed as additional officers of PRG2 on the C-2's filed with the Commissioner's office.

Claim 7

The complaint alleges that PRG2 failed to file a copy of its pre-election campaign finance report with the county election administrator. Montana Code Annotated § 13-37-225(1) states that all reports of contributions and expenditures must be filed with the Commissioner "and with the election administrator of the county in which . . . the political committee has its headquarters." An independent political committee is required to file a pre-election campaign finance report (C-6) "on the 12th day preceding the date of an election in which it participates by making an expenditure." Mont. Code Ann. §13-37-226(5)(a). As described in Fact 38, while

PRG2 timely filed its pre-election C-6 with the Commissioner's office, PRG2 filed a copy of the C-6 with the Gallatin County Elections Department on October 24, 2003 -- one day late.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is insufficient evidence to conclude that Sunny McGee violated Montana campaign finance and practices laws. There is sufficient evidence to conclude that People for Responsible Government, Inc. violated Montana campaign finance and practices laws and regulations, as discussed above in relation to Claims 6 and 7.

Dated this _____ day of December, 2005.

Gordon Higgins
Commissioner